No. 153

Supreme Court of the United States

OCTOBER TERM, 1950.

CITIES SERVICE GAS COMPANY, a corporation,
Appellant,

VERSUS

PEERLESS OIL AND GAS COMPANY, a corporation; CORPORATION COMMISSION OF THE STATE OF OKLAHOMA; THE STATE OF OKLAHOMA ON RELATION OF THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA; TEXAS COUNTY LAND AND ROYALTY OWNERS ASSOCIATION, and PHILLIPS PETROLEUM COMPANY, a corporation,
Appellees.

APPELLANT'S REPLY BRIEF

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October, 1950.

UTTERBACK TYPESETTING CO., 13 SOUTH WALKER, OKLAHOMA CITY, OKLA., PH. 3-8780

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ARGUMENT

Right of Appellant to question constitutionality of statutes.

Appellees in their brief advance the untenable and frivolous contention that Appellant is barred from questioning the constitutionality of 52 O. S. 1941, 233 and 239, because by entering the State as a foreign corporation and engaging in business after the enactment of the questioned statutes it accepted the terms and provisions thereof. A long list of cases is cited by Appellees to support their contention, including *Wheeling Steel Corp.* v. *Glander*, 337

U. S. 562, 571, 93 L. Ed. 1544, 1551. In the *Glander* case this Court said that the State may arbitrarily exclude a foreign corporation or may license it upon any terms it sees fit *but it cannot exact surrender of its rights derived under the Constitution of the United States.*

Appellant, as shown by the record, has at no time acquiesced in or recognized the validity of either of the statutes involved with respect to price-fixing. Appellant has conducted its business in Oklahoma under State license for many years before the issuance of the orders in question in this case and before the statutes in question were construed by the Supreme Court of Oklahoma to authorize price-fixing. The authority of Commission in this case to fix the price of gas has been challenged by Appellant at every stage of the proceeding from its very inception. Appellant has at no time invoked the power which it now assails, neither has Appellant accepted any benefits under the Act with respect to price-fixing.

The foregoing facts cannot be disputed. In *Connecticut Life Ins. Co.* v. *Johnson,* 303 U. S. 77, 79, 80, 82 L. Ed. 673, 677, this Court had occasion to consider the same contention as is now advanced by Appellees and in response thereto said:

> "No contention is made that appellant has consented to the tax imposed as a condition of the granted privilege to do business within the state. Nor could it be, for it appears that appellant had conducted its business in California under state license for many years before the taxable years in question and before the taxing act was construed by the highest court of the state, in *Connecticut Gen. L. Ins. Co.* v. *Johnson, supra,*

to apply to premiums received in Connecticut from reinsurance contracts effected there. A corporation which is allowed to come into a state and there carry on its business may claim, as an individual may claim, the protection of the Fourteenth Amendment against a subsequent application to it of state law. *Hanover F. Ins. Co.* v. *Harding (Hanover F. Ins. Co.* v. *Carr)* 272 U. S. 494, 71 L. Ed. 372, 47 S. Ct. 179, 49 A. L. R. 713; compare *Kentucky Finance Corp.* v. *Paramount Auto Exch. Corp.*, 262 U. S. 544, 67 L. Ed. 1112, 43 S. Ct. 626."

In *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, 400, 72 L. Ed. 927, 929, it is stated:

"It is established that a corporation by seeking and obtaining permission to do business in a state does not thereby become bound to comply with, or estopped from objecting to, the enforcement of its enactments that conflict with the Constitution of the United States. The right to withhold from a foreign corporation permission to do local business therein does not enable the state to require such a corporation to surrender the protection of the Federal Constitution."

Compare *Buck* v. *Kuykendall*, 267 U. S. 307, 316, 317, 69 L. Ed. 623, 627.

In *Republic Nat. Gas Co.* v. *State*, 198 Okla. 350, 180 Pac. (2d) 1009, Appellees, Peerless Oil and Gas Company and Corporation Commission of Oklahoma, made the same contention as here advanced. The Supreme Court of Oklahoma in that case sustained their contention. The case was, however, appealed to this Court, 334 U. S. 62, 92 L. Ed. 1212. Although the appeal was dismissed because the order and judgment appealed from was not final, this Court in dismissing the appeal said, in the last line of the opinion,

"all of Republic's constitutional objections are of course saved." If Republic, as decided by the Oklahoma Supreme Court in the *Republic* case, had waived its constitutional right to attack the validity of one of the very statutes here under question, how could its constitutional objections thereto be saved? It is impossible to save a constitutional objection and at the same time lose it by estoppel or waiver. That there is no merit to the contentions of Appellees in this respect is further evidenced by the fact that in this case in the Supreme Court of Oklahoma they made the very same contention as here made but the Supreme Court of Oklahoma did not even deem it of sufficient importance to mention it in its opinion. Apparently the Supreme Court of Oklahoma, since the decision of this Court in the *Republic* case, is now of the opinion that *Pierce Oil Corp.* v. *Phoenix Rfg. Co.*, 259 U. S. 125, 66 L. Ed. 855, is not applicable to the facts of this case as evidenced by the record. The contention of Appellees that Appellant has waived its right to and is estopped from attacking the constitutionality of the statutes in question is not well taken and should be rejected.

Is the Supreme Court of Oklahoma lawfully empowered within the meaning of the provisions of the 14th Amendment, as applied to Appellant, to interpolate into 52 O. S. 1941, 239, an unambiguous state act pertaining solely to the conservation of natural gas as a commodity, a price-fixing policy with respect thereto where the State Legislature has not either declared any such policy or provided in the act any standard to guide a state commission in the exercise thereof?

Appellees have not only misconceived but have wholly disregarded the issue before the Court under this proposi-

tion. The question here does not concern the power of the Oklahoma Legislature to enact a gas price-fixing measure. It relates solely to the power of the Oklahoma Supreme Court as a judicial body to write into a state statute, under the guise of interpretation, gas price-fixing powers where the State Legislature has not done so or provided in the statute any standard to guide Commission in exercising such claimed right, but, on the contrary, has specifically declared against any such gas price-fixing policy for the State of Oklahoma. In every price-fixing case cited either in Appellant's brief or Appellee's brief the State Legislature or the Congress, as the case may be, has expressly and specifically conferred upon a subordinate agency such authority and provided a standard to follow even though general. In *Nebbia* v. *New York*, 291 U. S. 502, 537-538, 78 L. Ed. 940, 956, which is the basic price-fixing case, this Court said:

> "Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

This Court said further:

> "The courts (including the Oklahoma Supreme Court) are without authority to declare such policy or, when it is declared by the Legislature, to override it" (Insert supplied).

The only policy with respect to gas price-fixing that the Oklahoma Legislature has ever declared is set forth in the

Interstate Compact to Conserve Oil and Gas adopted by the Legislature of Oklahoma by Statute 52 O. S. 1941, 204, in 1935, long after the enactment of the 1913 and 1915 Acts before the Court in this case. That policy is set forth in this plain and unambiguous language:

> "It is not the purpose of this Compact to authorize the states joining herein to limit the production of oil or gas for the purpose of stabilizing or fixing the price thereof." Article V, Compact.

It is thus abundantly clear that the Oklahoma Legislature has declared itself to be opposed both to the principle and to the practice of price-fixing.

Appellees contend that Appellant "asserts that this Court may reverse a State Court's construction of said statute if this Court would construe it differently" (Appellees' Br. 20). This is not a correct statement of Appellant's position. Appellant, however, does assert and does contend that, where the language of a state statute is plain, there is no room for interpretation and that the plain language of the Legislature controls. The want of price-fixing provisions in the unambiguous Oklahoma statute to make it constitutional cannot be cured by the Oklahoma Supreme Court's inserting them in judgments under it. To permit such a defect in the law to be cured by construction given to the plain words of the statute by the court having final authority to declare their intent violates the first essential of due process. *Louisville & N. R. Co.* v. *Central Stockyards Co.*, 212 U. S. 132, 144, 53 L. Ed. 441, 446; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 219, 58 L. Ed. 1284, 1286; *Nebbia* v. *New York*, 291 U. S. 502, 537,

78 L. Ed. 940, 947. Moreover, when the interpolation, as here, seeks to clothe the State with a valid exercise of the police power, and thus defeat Appellant's rights under the Federal Constitution, this Court can and should determine the meaning and effect of the statute independently, as applied by said order to Appellant. *Bain Peanut Co.* v. *Pinson*, 382 U. S. 499, 501, 75 L. Ed. 482, 490, 491. Compare reasoning in *A., T. & S. F. Railroad Co.* v. *Mathews*, 174 U. S. 97, 110, 43 L. Ed. 909, 911, and *John Larson* v. *State of South Dakota*, 278 U. S. 430, 433, 73 L. Ed. 441, 444.

Appellees contend further:

> "The statute (52 O. S. 1941, 239) is not void for failure to provide a standard of policy to guide the Commission in fixing the price. It grants the Commission no arbitrary power in that respect" (Appellees' Br. 47).

Appellees then proceed to cite cases where this Court has approved such general standards as "fair and reasonable", "fair and equitable", "unreasonable", "undesirable aliens" and "reasonable and just." An examination of the cases wherein this Court has approved these very general standards will reflect that such standards were as specific a formula as the circumstances of the subject matter would permit. The rule was laid down because the field was one where flexibility and the adaptation of Congressional policy to infinitely variable conditions constituting the essence of the program required it. Compare *Lichter* v. *United States*, 334 U. S. 742, 785, 92 L. Ed. 1694, 1726, 52 O. S. 1941, 239. The statute upon which the Court said Commission's price-fixing authority was based, does not contain even a sem-

blance of a standard. As evidenced by Appendices "A", "B" and "C" price-fixing is subject to a specific formula.

Appellees in their brief rely heavily on the words "equitable purchasing", set forth in 52 O. S. 1941, 240, as a standard to guide Commission in the exercise of price-fixing authority which the Oklahoma Supreme Court decided Commission possessed by implication under 52 O. S. 1941, 239. In the first place, 52 O. S. 1941, 240, relates solely to common purchasers. Order 19514 of Commission is directed against production and not to common purchasers as such. In addition, the Oklahoma Supreme Court confined the authority of Commission in its promulgation of Order 19514 solely to 52 O. S. 1941, 239. It did not so much as hint that "equitable purchasing" might have the meaning which Appellees seek to ascribe to it. Even if it could be assumed that "equitable purchasing" is the standard in this case, Commission would be required to fix a price, taking due account of prevailing market conditions relevant to the price to be paid, as described by the minority opinion of this Court in *Republic Nat. Gas Co. v. Oklahoma*, 334 U. S. 62, 99, 92 L. Ed. 1212, 1236. As stated by Mr. Justice Halley in his dissenting opinion in the case at bar (R. 923), "any other price would be unfair, discriminatory and inequitable." The price fixed by the Commission and applied to Appellant practically doubles the going or market price in the field. To say the least, this does violence to any concept of "equitable purchasing." It is simply arbitrary, unreasonable and capricious action, in direct violation of the due process clause.

Appellant submits that, as applied to it in this case, to permit the Oklahoma Supreme Court to interpolate into

the unambiguous act in question a price-fixing policy where the State Legislature has neither declared any such policy nor provided in the Act any standard to guide the exercise thereof, but, on the contrary, has expressly declared against such a policy, is arbitrary, unreasonable, and capricious action by a judicial tribunal and violative of the due process clause of the Federal Constitution. *Nebbia* v. *New York*, 291 U. S. 502, 537, 78 L. Ed. 940, 947.

The Natural Gas Act and Interstate Commerce

Appellees state in their brief that Appellant contends that the orders of the Corporation Commission of Oklahoma and the judgment of the Supreme Court upholding them as valid violate the provisions of the Natural Gas Act, as amended, 52 Stat. 821, 15 U. S. C. A. 717, *et seq.*

Appellant has made no such contention, but has relied on the point that the orders of the Oklahoma Corporation Commission violate the commerce clause of the Federal Constitution because they cast an undue burden upon and discriminate against interstate commerce and the interstate operations of Appellant and that any claimed violation of the Natural Gas Act would in effect be merely cumulative to such argument.

Whether Congress, by enactment of the Natural Gas Act, has entered the field of regulation of sales of natural gas in interstate commerce by independent producers, such as those who sell gas to Appellant in the Guymon-Hugoton Field, has not been drawn in question by specific assignment of error, either in the court below or in this Court.

Until recently Federal Power Commission has given a negative answer to that question. *In re Columbian Fuel Corp.* v. *Federal Power Comm.*, 2 F. P. C. 200, F. P. C. Order No. 139 dated August 7, 1947. However, the question has become the subject of considerable debate since the decision by this Court in the case of *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U. S. 682, 91 L. Ed. 1742, which was handed down after Appellant had perfected its appeal in the court below.

Although Appellant does not believe that Congress intended to include such field sales of gas within the ambit of regulation under the Natural Gas Act, it recognizes that if its views in this respect are erroneous the orders of the Corporation Commission of the State of Oklahoma violate the provisions of a federal statute and therefore are void. In that event Appellant assumes that this Court will, in its discretion, consider such violation as error under Section 6, Rule 27, of the Rules of this Court. *Seaboard Air-lines Co.* v. *Daniel*, 331 U. S. 118, 122, 92 L. Ed. 580, 585; *United States* v. *Corrick*, 298 U. S. 435, 440; 80 L. Ed. 1263, 1268; *Matson Navigation Co.* v. *United States*, 284 U. S. 352, 76 L. Ed. 330, 342.

Irrespective, however, of the question whether the Natural Gas Act confers upon the Federal Power Commission the power to fix field prices of gas such as those here involved and assuming that Congress deliberately intended to leave such field prices of gas free from regulation, because of the competitive situation with other fuels, Appellant contends that the orders violate the commerce clause for the additional reason that they seriously impair

and impede the administration and enforcement of the provisions of the Natural Gas Act.

Under the Natural Gas Act, Federal Power Commission is required to fix just and reasonable rates for Appellant's sales of gas at city gates in its five-state service territory. The field wide order affects not only Appellant but other producers and purchasers, including other interstate pipe line companies which now or hereafter may obtain their gas from the producing structures of the Guymon-Hugoton Field for interstate transportation and sale. Ninety per cent of the gas produced in the Guymon-Hugoton Field goes into interstate commerce. Thus, it is obvious that the Federal Power Commission would be confronted with chaotic conditions in its efforts to perform in an orderly manner the functions delegated to it by Congress, including the fixing of just and reasonable rates at city gates. It would be faced with the necessity of adjusting and readjusting such rates as often as the Corporation Commission of Oklahoma changed the price and measurement provisions of its field wide order. The impact of such state orders clearly would frustrate and make quite futile any attempt of Federal Power Commission to effect an orderly regulation of the interstate transactions entrusted to it and would thereby so obstruct and interfere with interstate commerce as to be an unlawful contravention of the commerce clause of the Federal Constitution.

Other Contentions of Appellees

On page 17 of their brief Appellees assert "there is no competitive market for gas in the Hugoton Field, it having

been stifled by the control of acreage and markets by the pipeline operators therein * * *." Commission claims that as a result of this control "natural gas is being taken out of the Guymon-Hugoton Field at a price less than its actual or fair market value * * *" (R. 16). The assertion that there is no competitive price for gas in said field is not borne out by the record. Attention is here directed to the terms and provisions of Cities Service's gas purchase contract with Republic Natural Gas Company, the owner of about 96,000 acres of leases dedicated to Appellant's pipeline (R. 40). This contract plainly shows that the price of gas thereunder is subject to adjustment after March 1, 1951 (R. 717-718). The contract requires the price to be adjusted and established for each five-year period, first, by agreement of the parties, and second, in the event the parties are unable to agree, by arbitration (R. 718). The gas purchase contract between Cities Service and Skelly Oil Company, the owner of approximately 47,000 acres of leases dedicated to Appellant's pipeline (R. 402, 688), contains a provision for the adjustment of price in the event buyer (Appellant) pays more or less to some other seller in the field from whom it may purchase gas (R. 703-704). The gas purchase contract between Cities Service and Harrington & Marsh, the owner of approximately 75,000 acres of leases in the pool under contract to Appellant (R. 795), provides that the contract shall remain in force until January 22, 1947, and continue thereafter unless cancelled on such expiration date or on the 22nd day of any succeeding month, thereby giving a right to seller to terminate said contract at its option (R. 801).

The companies in addition to Appellant transporting gas out of the pool are Southwest Public Service Company, Phillips Petroleum Company, and Panhandle Eastern Pipe Line Company (R. 386). The latter company technically does not take gas from the field but purchases the gas from Phillips Petroleum Company after Phillips has produced and transported it to Texas where the actual sale and delivery is made by Phillips to Panhandle Eastern. Appellant does not have any interest in or control over any of these companies, directly or indirectly (R. 393).

In the face of these undisputed and indisputable facts, the assertion of Appellees that there is no competitive market for gas in the Hugoton Field or that the price under said contracts are in any manner controlled is wholly without foundation in fact and is simply not true.

Samples of Appellees' distortion of the record to suit their desires are here given. On page 13 of their brief they contend that Peerless tendered its gas to Appellant at six cents (6¢) per Mcf, then say, "Stanolind's and Magnolia's gas which Cities has contracted to purchase at six cents in the Hugoton Field" (R. 419). They also include Harrington & Marsh (p. 65 Appellee's Br.) (R. 410). At the outset of their brief (p. 1) Appellees say, "and the Guymon-Hugoton Gas Field will be called the 'Hugoton Field', or 'the field.'" Even a casual perusal of the record will show that the contracts of Appellant with Stanolind and Magnolia are in the Kansas portion of the Hugoton Gas Field and wholly outside the jurisdiction of the Oklahoma Commission (R. 418-419). That Appellant had no contract with Harrington & Marsh except the one shown in record (R. 795).

In their brief Appellees allege that Appellant refused to take the gas of Peerless unless Peerless would dedicate to it the gas from all its leases in the pool for the life of the Peerless leases (Appellees' Brief, p. 16) (R. 15, 24). In support of their contention they cite Findings 20 and 21 of the Commission (R. 15). The record absolutely refutes such an assertion; see paragraph 4 of Appellant's answer filed with Commission (R. 48, 548—Par. 9, Order 17867). The record shows that Appellant has been at all times ready and willing to take by purchase the Peerless gas as well as any other producer's gas tendered to it in compliance with Commission's subsisting rules and regulations, at the going price in the field (R. 48, 548—Par. 9, Order 17867). As a matter of fact Peerless in its application so concedes (R. 33).

On page 55 of their brief Appellees say, "Appellant was already discriminating as between producers, both in the taking of gas and in the price paid. It took the gas from some and refused to take it from others and it paid a different price to the various sellers." An examination of the answer of Appellant (R. 48), the application of Peerless (R. 33) and Appellant's respective subsisting gas purchase contracts (R. 688, 713, 795) completely refutes such contention. It is wholly immaterial whether Appellant is a common purchaser, a common carrier or a public utility because it has at all times been ready and willing to accept and take by purchase the gas of any producer in the field, at the going price therein. This conclusion is adequately supported by the decision of the Oklahoma Supreme Court in *Republic Nat. Gas Co.* v. *Okla.*, 198 Okla. 350, 180 Pac. (2d) 1001, where it was held that regardless of whether

the taker is a common purchaser, a common carrier, or a public utility, it is required to take the gas of any producer, when properly tendered, to prevent drainage.

Appellees, on page 43 of their brief, say, "the statement that correlative rights of owners were being protected is simply not true. Appellant's refusal to take their gas, except under contract for the life of the lease and at a non-competitive price fixed by it, with the alternative of suffering the drainage of their leases, did not constitute the protection of their correlative rights, and therefore the order was not arbitrary and was not irrelevant to the State's policy of protecting the rights of owners and lessees." These assertions are certainly incorrect in view of the record. No question of drainage can be involved in this case because Appellant has at all times been willing to take by purchase any gas properly tendered to it at the going price in the field. The taking of the Peerless gas under the stipulation eliminates any question of drainage (R. 90). The only dispute there is in this case relates to a change of measurement base and the fixing of a price higher than the going or market price in said field. Appellant feels confident this Court will readily see that Appellees' unfounded assertions regarding drainage and protection of correlative rights are but an evasive method by which Appellees seek to justify the arbitrary and capricious action of Commission in fixing a price based on nothing more substantial than its whim or fancy at the time. MR. JUSTICE RUTLEDGE in *Republic Nat. Gas Co.* v. *Okla.*, 334 U. S. 62, 99, 92 L. Ed. 1212, 1236, clearly indicated that the Commission, on the contrary, would be required to take "due account of prevailing market conditions relevant to the price to be paid."

Any assertion that Appellant "controls" the price of gas in the field is rendered absurd by the plain provisions of the above quoted contracts which show that after the fixed period stated therein Appellant has no control whatever over the price to be paid for natural gas.

Appellees further contend, on page 45 of their brief, that the limiting of the orders solely to the Guymon-Hugoton Field does not constitute a denial of equal protection of the laws. They assert that conditions differ in different fields. This is not the question. The ultimate test is not whether one gas field differs from another but whether the differences between them are pertinent to the subject with respect to which the classification is made; that is, in this case, price and measurement base; *Met. Casualty Co.* v. *Brownell,* 294 U. S. 580, 583, 79 L. Ed. 1070, 1072. It is the further contention of Appellees that the burden is upon Appellant to show that conditions in other fields are so like those in the Hugoton Field with respect to price and measurement base as to require the same order. Appellant does not concede this to be correct because Peerless, as well as Commission and Land Office, has limited the hearing in this case to one gas field, namely, the Guymon-Hugoton Pool. Moreover, the rule with respect to the question here presented is laid down in *Met. Casualty Ins. Co.* v. *Brownell, supra,* to the effect that courts may not declare a legislative discrimination invalid unless viewed in the light of facts *made known or generally assumed, which are of such character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators.* This Court held, in *Mayflower Farms* v. *Ten Eyck,*

297 U. S. 266, 274, 80 L. Ed. 675, 679, that in the absence of any showing of reasonable basis for the classification made by statute, the Court has no right to conjure up possible situations which might justify the discrimination. Regardless of these cases, the record in this case shows that Commission by statewide rules and regulations in effect at the time of the hearing (R. 637) defined a cubic foot of gas for reporting purposes (R. 644, No. 15); that is, by statewide rule, Commission says that gas shall be measured for reporting purposes on the same basis in every field in the State. This of itself is an acknowledgment by Commission that gas can and should be measured upon the same basis in every field; that no good reason exists to measure gas in one field on a different basis as distinguished from other fields. The Department of Interior, United States Geological Survey operating regulations to govern the production of oil and gas under the Act of February 25, 1920 (R. 578) promulgate a uniform rule for the measurement of gas. These regulations applied to the measurement of gas produced on all the public lands of the United States, wherever located. Commissioners of the Land Office adopted those rules with respect, among other things, to the measurement of gas produced from all lands owned by the State of Oklahoma, wherever located (R. 578). Specific attention of this Court is directed to the measurement formula set forth in said regulations (R. 578, 579). Appellant reiterates here its contention as consistently made throughout this brief—that the arbitrary selection of the Guymon-Hugoton Pool for special treatment by Commission with respect to price and measurement base is a denial to Appellant, who is a producer and purchaser in many

gas fields in the State of Oklahoma (R. 636A), of the equal protection of the laws in violation of the equal protection clause of the Federal Constitution. No good reason does or can exist, in the light of this record, which would justify or even require the discrimination apparent in this record. This is particularly true when a change in the existing measurement base is utilized for increasing the price of gas in one field to the exclusion of other fields and in connection therewith and at the same time practically doubling the going or market price in that certain field. No greater burdens should be laid upon one than are laid upon others in the same calling and condition; *Barbier* v. *Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923, 925.

On page 43 of Appellees' brief they impliedly concede no physical waste of gas in the field when they say, "if there was no physical waste of gas in the field, it was because the producers who had no outlet did not blow their gas into the air * * *." None of the gas statutes of Oklahoma covers economic waste, although the oil statutes do. Laws 1945, p. 156, Sec. 2. If the Legislature had intended to cover economic waste, it would have so stated in the gas conservation acts, as it did in the oil conservation acts.

Appellees contend "if the price for gas is too low the producers will abandon their wells long before all the recoverable gas has been recovered, resulting in actual physical waste" (Appellees' Brief, p. 9). Nothing in the record indicates abandonment of the Guymon-Hugoton Field within the foreseeable future at any given pressure. The average original pressure in the field was about 432 lbs. (R. 72). During the year ending May, 1946, the field pressure had been reduced by 7½ lbs. (R. 74). Since the

first well in the field was drilled in 1924 (R. 71-72), it follows that 22 years were required to reduce the pressure by 7½ lbs. If the price-fixing order of Commission is to prevent an early abandonment of the field, it is certainly premature. It can hardly be contended that it is necessary to increase the price now to prevent abandonment of the field 20 or 30 years hence. What Commission has sought to do obviously bears no reasonable relationship to the end sought to be accomplished.

Every prudent gas producer knows, and the Legislature of Oklahoma, as well as the Commission, has recognized that in drilling, completing and operating gas wells it is necessary to vent some gas. In this connection we direct the specific attention of the Court to the statewide rules of Commission (R 663) relating to conditioning of wells. There it is said, "nothing contained in these rules shall be construed as prohibiting the blowing of wells when such blowing is necessary for efficient operation." The same rules provide for acidization and chemical treatment of wells for production (R. 652). The Statutes of Oklahoma, 52 O. S. 1941, 238, provide, among other things, "* * * and provided further, the gauge of the capacity of any well shall not be taken until such well has been allowed an open flow for the period of three days" (Append. F, p. xxi) The 1945 Sess. L. Okla. (Append. F, p. xxvi), in prohibiting waste, provide:

> "The escape, blowing or releasing, directly or indirectly, into the open air of gas from wells productive of gas only drilled into any common source of supply, *save only such as is necessary in the efficient drilling and completion thereof* * * *" (Italics supplied).

The evidence of Rae (R. 361-363), of Hanley (R. 367-371), and of Frank (R. 373-375), is not contradicted and shows the necessity of acidization and chemical treatment in the efficient drilling and completion of wells in this pool. The record is devoid of any evidence that this Appellant, or any other producer in the pool, has committed waste, as defined by the Oklahoma Statutes, in the drilling or completion of wells.

Appellees contend that the proceeding resulting in the two orders in question was legislative and not judicial in character (Appellees' Brief, p. 50). They assert, "the fixing of a price at which a commodity shall be purchased or sold is a legislative and not a judicial act." That this is not true when it concerns the settlement of a dispute between private parties is well established by the Supreme Court of Oklahoma in *Cimarron Utilities Co.* v. *Safranko,* 187 Okla. 86, 101 Pac. (2d) 258.

Appellees contend that Field Order 19514 of Commission is not ambiguous. On page 55 of their brief they say, "it (Order 19514) requires *purchasers* to pay the same price upon the same basis of measurement and thus not only prevents *Appellant and other purchasers from discriminating as between sellers,* but it makes the *same requirement of all purchasers,* and thus prevents discrimination as against Appellant." Peerless in its answer brief before the State Supreme Court (p. 72), said:

> "Insofar as the field order (19514) is concerned, attention is called to the fact that it fixes the price or value of natural gas in the Guymon-Hugoton Field in the producing formations, and provides that natural gas may not be taken out of the producing formations

at less than 7¢ per Mcf. The Commission's order has its effect before the gas has been produced, or at least at the very instance of its production, and before the gathering process has begun, as well as before the interstate journey has commenced."

Commission and Land Office in their answer brief before the State Supreme Court (p. 29), say, in referring to the field order:

"Here the Corporation Commission determined the price below which gas would not be permitted to be produced."

The Supreme Court of Oklahoma, although duly requested by Appellant, failed to clarify the meaning and extent of the field order. What more proof is necessary to disclose the vagueness and indefiniteness of this order? If the Appellees themselves take different positions at different times as to its meaning and extent, and the Supreme Court has not clarified the meaning of the order, how can Appellant be expected to hazard a guess at the meaning and extent of said order under dire penalties for an error in so guessing?

The foregoing substantially covers the important and material contentions of Appellees in their brief. Appellant submits that in the light of the undisputed and indisputable facts in the record the orders of Commission in this case, as well as the Statutes of Oklahoma upon which said orders are based, as applied to Appellant, clearly disclose not only that said orders and said statutes, as applied, violate the due process and equal protection clauses of the Federal Constitution but also that same cast an undue

burden upon and discriminate against interstate commerce and the interstate operations of Appellant.

CONCLUSION

For all reasons here urged and those in Appellant's original brief, the final judgment of the Oklahoma Supreme Court should be reversed and declared void because in violation of the Federal Constitution.

Respectfully submitted,

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